APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JANUARY 20, 2004

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 02-3662

COLLEEN P. KRAMER,

Plaintiff-Appellant,

v.

BANC OF AMERICA SECURITIES, LLC,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 99 C 6768—**James B. Zagel**, *Judge*

ARGUED SEPTEMBER 17, 2003—DECIDED JANUARY 20, 2004

Before RIPPLE, MANION, and WILLIAMS, *Circuit Judges*.

MANION, *Circuit Judge*. Colleen Kramer sued her former employer, Banc of America Securities, LLC ("BOA"), for, among other things, retaliatory discharge in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (the "ADA"). After a bench trial, the district court found in favor of BOA. On appeal we must determine whether

compensatory and punitive damages are available as a remedy for a retaliation claim against an employer under the ADA. We affirm the district court's decision to deny consideration of compensatory and punitive damages, and its decision to conduct the trial in this case without a jury.

I.

Colleen Kramer worked in BOA's Chicago, Illinois office from October 1995 until October 1999. Her responsibilities included heading a team responsible for the structuring of loans for middle market companies so that the loans could be syndicated to other financial institutions. In October 1998, BOA and NationsBank merged. As a result of this merger, Kramer began reporting to a new supervisor, Mary Lynn-Moser.

Although Moser was impressed by the performance of Kramer's team during early 1999, Moser was critical of Kramer's job performance, particularly Kramer's leadership skills and interpersonal skills. At the end of May 1999, Moser replaced Kramer as team leader with another employee, although Kramer retained her salary and title as managing director. Moser also gave Kramer a memorandum critiquing Kramer's performance and stating that Kramer would need to improve her performance within the next 90 days.

In June 1999, Kramer responded to the demotion and memorandum through a letter from her lawyer. The letter demanded that she be reinstated as team leader and also revealed that Kramer suffered from multiple sclerosis. This was the first notice that BOA had of Kramer's disease.

A few months later, on September 1, 1999, Moser wrote another detailed memorandum that directed Kramer to, within 30 days, improve her performance in several specific areas or face termination of her employment. On September 24, 1999, Kramer filed a charge of disability discrimination and retaliation with the United States Equal Employment Opportunity Commission (the "EEOC"). Four days later, Kramer sent Moser and Moser's supervisor an e-mail message notifying them of her charge. On September 30, 1999, the EEOC issued Kramer a Notice of Right to Sue.

On October 7, 1999, Moser informed Kramer that her employment with BOA was terminated. A little more than a week later, on October 15, 1999, Kramer filed suit in the United States District Court for the Northern District of Illinois, alleging disability discrimination and retaliation under the ADA and a state law claim for intentional infliction of emotional distress. The complaint sought front pay, back pay, compensatory and punitive damages, reinstatement, and attorney's fees and costs.

On May 23, 2000, Kramer filed a second charge of discrimination with the EEOC. This charge included an allegation of retaliatory discharge. On June 13, 2000, the EEOC issued her a second Notice of Right to Sue. Kramer filed an Amended Complaint on May 2, 2001, in which she dropped her state law causes of action. Both Kramer's Complaint and Amended Complaint demanded a jury trial on all issues. BOA's Answer and Answer to the Amended Complaint also included demands for jury trial.

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BOA filed a motion for summary judgment on all of Kramer's claims. On December 6, 2001, the district court granted summary judgment in BOA's favor on Kramer's disability claims, but denied BOA's motion with respect to Kramer's claim of retaliatory discharge. Trial on Kramer's remaining claim was scheduled for May 13, 2002.

On May 3, 2002, BOA filed a Motion to Exclude Compensatory and Punitive Damages and Strike Plaintiff's Jury Demand. In its motion, BOA asserted that compensatory and punitive damages are not recoverable on a claim of retaliation under the ADA. In addition, BOA argued that, because Kramer was not entitled to recover compensatory and punitive damages under the ADA, Kramer had no statutory right to a jury trial.

The district court granted BOA's motion on May 10, 2002. The court found that compensatory and punitive damages were not available as a remedy and that Kramer was not, therefore, entitled to a jury trial. The district court also refused to impanel an advisory jury.

The district court proceeded with a six-day bench trial on Kramer's retaliation claim, at the conclusion of which the court ruled in favor of BOA. The district court entered written findings of fact and conclusions of law on September 11, 2002. This appeal followed.

Appendix A

II.

On appeal, Kramer argues that the district court erred in ruling that the she was not entitled to seek compensatory and punitive damages for a claim of retaliation under the ADA. In a related argument, Kramer claims that, because she was entitled to seek compensatory and punitive damages, she was entitled to a jury trial and it was reversible error on the part of the district court to strike her jury demand. Kramer also maintains that, independent of her claim for compensatory and punitive damages, she was entitled to a jury trial because BOA consented to a jury.[1]

A. Compensatory and Punitive Damages

Kramer contends that she is entitled to seek compensatory and punitive damages for her claim of retaliation under the ADA. This is a matter of statutory interpretation which is subject to de novo review. *Jones v. R.R. Donnelley & Sons, Co.*, 305 F.3d 717, 722 (7th Cir. 2002).

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1. Kramer also claims that she had a constitutional right to a jury trial, even if this court finds that she was not entitled to recover compensatory and punitive damages. Kramer provides no legal support for the one sentence in her brief dedicated to this argument. The absence of any supporting authority or development of an argument constitutes a waiver on appeal. *See United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir.1991) ("We have repeatedly made clear that perfunctory and undeveloped arguments that are unsupported by pertinent authority, are waived (even where those arguments raise constitutional issues).").

Appendix A

Remedies available to a party making a retaliation claim against an employer under the ADA are first determined by reference to 42 U.S.C. § 12117. Section 12117, in turn, provides that the available remedies are those provided by the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-4 through e-9, 42 U.S.C. § 12117(a). Section 2000e-5(g)(1) provides that a court may order certain equitable relief including, but not limited to, back pay, but it does not provide for compensatory or punitive damages.

However, the 1991 Civil Rights Act, 42 U.S.C § 1981a(a)(2), expands the remedies available under § 2000e-5(g)(1) in certain circumstances, to provide for compensatory and punitive damages. Specifically, § 1981a(a)(2) provides, in pertinent part, that:

> [i]n an action brought by a complaining party . . . against a respondent who engaged in unlawful intentional discrimination . . . under . . . section 102 of the [ADA] or committed a violation of section 102(b)(5) of the [ADA], against an individual, the complaining party may recover compensatory and punitive damages. . . .

42 U.S.C. § 1981a(a)(2)

Kramer argues that § 1981(a)(2) permits a plaintiff making a claim of retaliation against an employer under the ADA to recover compensatory damages. This question appears to be one of first impression for federal circuit courts. We have not found, and the parties have not cited, any federal circuit courts that have considered this question. Kramer

directs our attention to the decisions of three circuits—the Second, Eighth and Tenth Circuits—that have affirmed jury verdicts where compensatory and punitive damages had been awarded on ADA retaliation claims. *See, e.g., Salitros v. Chrysler Corp.*, 306 F.3d 562, 570 (8th Cir. 2002); *Muller v. Costello*, 187 F.3d 298, 314 (2d Cir. 1999); *E.E.O.C. v. Wal-Mart Stores, Inc.*, 187 F.3d 1241 (10th Cir. 1999). These decisions focused on whether there was sufficient evidence to award compensatory and punitive damages, but none examined the legal question of whether such damages were authorized for an ADA retaliation claim. The district courts that have addressed the question are split. *Compare Sink v. Wal-Mart Stores*, 147 F.Supp.2d 1085, 1100-01 (D. Kans. 2001) (compensatory and punitive damages are not available for retaliatory discharge claim), *Boe v. AlliedSignal Inc.*, 131 F.Supp.2d 1197, 1202-03 (D. Kans. 2001) (same), and *Brown v. City of Lee's Summit*, 1999 WL 827768, *2-*4 (W.D. Mo. 1999) (same), *with Lovejoy-Wilson v. Noco Motor Fuels, Inc.*, 242 F.Supp.2d. 236, 240-41 (W.D.N.Y. 2003) (compensatory and punitive damages are available), *Rhoads v. FDIC*, 2002 WL 31755427, *1-*2 (D.Md. 2002) (same), and *Ostrach v. Regents of the University of California*, 957 F.Supp. 196, 200-01 (E.D. Cal. 1997) (same).

The district court's analysis in *Brown v. City of Lee's Summit* is thorough and particularly persuasive. We agree with that court's conclusion that "a meticulous tracing of the language of this tangle of interrelated statutes reveals no basis for plaintiff's claim of compensatory and punitive damages in his ADA retaliation claim." 1999 WL 827768, at *3.

We thus conclude that the 1991 Civil Rights Act does not expand the remedies available to a party bringing an ADA retaliation claim against an employer and therefore compensatory and punitive damages are not available. A close reading of the plain language of § 1981a(a)(2) makes it clear that the statute does not contemplate compensatory and punitive damages for a retaliation claim under the ADA. Section 1981a(a)(2) permits recovery of compensatory and punitive damages (and thus expands the remedies available under § 2000e-5(g)(1)) only for those claims listed therein. With respect to the ADA, § 1981a(a)(2) only lists claims brought under §§ 12112 or 12112(b)(5). Because claims of retaliation under the ADA (§ 12203) are not listed, compensatory and punitive damages are not available for such claims. Instead, the remedies available for ADA retaliation claims against an employer are limited to the remedies set forth in § 2000e-5(g)(1). *See National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers,* 414 U.S. 453, 458 (1974) ("A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.").

The decisions of the district courts finding that compensatory and punitive damages are available are not persuasive. In *Lovejoy-Wilson v. Noco Motor Fuels, Inc.* and *Rhoads v. FDIC,* neither district court engaged in an analysis of § 1981a(a)(2). Rather, *Lovejoy- Wilson* relies in part on the fact that "courts within the Second Circuit have routinely allowed juries to decide ADA retaliation claims." 242 F. Supp. 2d at 240. As we pointed out above, the Second Circuit in *Muller* did not address the underlying question of

whether compensatory and punitive damages are available. The decision in *Rhoads* relied on the legislative history of the ADA. 2002 WL 31755427, at *1. We need not resort to a committee report's summary of legislative intent when the statute is specific. *See McCoy v. Gilbert,* 270 F.3d 503, 510 n.4 (7th Cir. 2001) (citing *United States v. Hudspeth,* 42 F.3d 1015, 1022 (7th Cir. 1994) (en banc)) ("We need never consider legislative history when interpreting an unambiguous statute."). The plain text of § 1981a(a)(2) is clear. *See Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'") (citations omitted). Because the plain language of § 1981a(a)(2) limits its application to specific claims, it is inappropriate to expand the scope of the statute in reliance on legislative history to include claims for retaliation by an employer under the ADA.

Finally, we disagree with the district court's analysis in *Ostrach v. Regents of the University of California.* In that case, the court quotes § 1981a(a)(2) as follows:

> [i]n an action brought by a complaining party under the powers, remedies and procedures set forth in § 716 or 717 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990) against a respondent who engaged in unlawful intentional discrimination . . . the complaining party may recover compensatory and punitive damages. . . .

Ostrach, 957 F. Supp. at 201. Significantly, what is omitted by the first set of ellipses is crucial to the question at issue. The omitted language lists the specific statutory sections for which a party may recover compensatory and punitive damages. The section providing an action for retaliation, § 203 of the ADA (42 U.S.C. § 12203), is not listed.

B. Kramer's Right to a Jury Trial

Because Kramer was not entitled to recover compensatory and punitive damages, she has no statutory or constitutional right to a jury trial. The only remedies Kramer (or any plaintiff bringing a claim of retaliation against an employer under the ADA) was entitled to seek were equitable in nature. *See* 42 U.S.C. § 2000e-5(g)(1) (stating that where an employer has engaged in an unlawful employment practice, a court may issue an injunction, reinstate the plaintiff employee, order back pay, or award "any other *equitable relief* as the court deems appropriate") (emphasis added). There is no right to a jury where the only remedies sought (or available) are equitable. *See, e.g., Marseilles Hydro Power, LLC v. Marseilles Land and Water Co.*, 299 F.3d 643, 648 (7th Cir. 2002) ("If the only relief sought is equitable . . . neither the party seeking that relief nor the party opposing it is entitled to a jury trial."). We need not, therefore, address Kramer's argument that it was reversible error for the district court to strike her demand for a jury trial; Kramer had no statutory right to a jury trial.

We need, however, to address Kramer's argument that, independent of whether she was entitled to recover compensatory and punitive damages, she was entitled to a

jury trial based on BOA's consent as evidenced by its demand for a jury trial in its answer to the Complaint and Amended Complaint. Federal Rule of Civil Procedure 39(c) addresses jury trials by consent.

> (c) **Advisory Jury and Trial by Consent.** In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Fed. R. Civ. P. 39(c). This court has held that issues of back pay and front pay are not beyond the scope of parties' consent to a jury trial. *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 501 (7th Cir. 2000).

Kramer claims that BOA consented to a jury trial when it included a demand for a jury trial in its answer to her Complaint and Amended Complaint. Once BOA consented, Kramer argues, citing Fed. R. Civ. P. 38(d), it could not withdraw such consent without Kramer's permission. Because she did not consent to such a withdrawal—she opposed BOA's motion to strike her jury demand—she claims the court erred in granting BOA's motion. The district court disagreed. The court doubted that BOA had actually consented to a jury trial on the issues of front and back pay but, regardless, found that it was not too late for BOA to withdraw its consent to a jury trial. The court also declined

to impanel an advisory jury. The court saw "no point to the expense and time of an advisory jury, particularly on an issue that I suspect I need no advice."

In order to determine whether BOA properly withdrew its consent to a jury trial it is important to review the events leading up to and including BOA's motion. Kramer's Complaint and Amended Complaint included a request for remedies (compensatory and punitive damages) that, had she been entitled to recover such remedies, would have entitled her to a jury trial as a matter of right. *See* 42 U.S.C. § 1981a(c)(1) ("If a complaining party seeks compensatory or punitive damages under this section any party may demand a trial by jury."). By including a demand for a jury in her Complaint and Amended Complaint, Kramer successfully exercised her right to have her claim heard by a jury. Fed. R. Civ. P. 38(b). BOA also made a demand for a jury trial in its answer to the Complaint and the Amended Complaint, though strictly speaking, such a demand was not necessary. The demand for a jury by one party is generally sufficient *where the jury trial is of right.*

Shortly before trial, BOA made a motion to exclude compensatory and punitive damages. The district court granted this motion. In this opinion we affirm the district court's decision. After the district court granted the motion, Kramer had no *right* to a jury trial. As we have discussed, Kramer was entitled to have her claim of retaliation (for which she was entitled only to equitable remedies) heard by a jury only if BOA consented and the district court agreed.

BOA also moved at the same time to strike Kramer's jury demand. In light of the district court's decision that there was no statutory right to a jury trial, this motion was proper. Federal Rule of Civil Procedure 39(a) provides that when a jury trial has been demanded and designated on the docket as a jury trial, the trial shall be heard by a jury, "*unless* . . . (2) the court *upon motion* or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States." Fed. R. Civ. P. 39(a)(2) (emphasis added).

Kramer's reliance on Rule 38(d) for the proposition that BOA could not withdraw a demand for a jury trial without her consent, is misplaced. Rule 38, as is made clear by its caption, is concerned with jury trials of right. Rule 38(d)'s requirement that the other parties consent to a withdraw of a demand permits those other parties to rely on the jury demand to protect their right to a jury trial. *See Partee v. Buch*, 28 F.3d 636, 636 (7th Cir. 1994) ("[T]he plaintiff . . . was entitled to rely on the defendant's jury demand and was not required to file a separate jury demand on his own."); 9 Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2318 (3d. ed. 1995). Assuming Kramer had a right to a jury trial (for instance, if she was actually entitled to recover compensatory and punitive damage), BOA could not withdraw a demand for a jury trial. But Kramer had no right to a jury trial and there is no restraint in the text of Rule 39 on the ability of a party to withdraw its consent to a jury trial that is not of right. *See Thaler v. PRB Metal Products, Inc.*, 810 F. Supp. 49, 50 (E.D. N.Y. 1993) (rejecting plaintiff's argument that Rule 38(d) prohibits a party from withdrawing its consent to a jury trial that is not

of right and noting that "plaintiff cites no authority for the proposition that . . . consent cannot be withdrawn prior to trial").

The question then is whether BOA properly withdrew its consent to a jury trial. The district court expressed some doubt as to whether BOA had ever consented to a jury trial on Kramer's claims of front and back pay. We need not address this question, however, because it is clear that, to the extent BOA did consent to a jury trial, it withdrew that consent with its motion to strike Kramer's jury demand. BOA filed its motion to strike Kramer's jury demand two weeks prior to the trial. The district court determined that this was not too late in the litigation process and Kramer has provided no reason why she was prejudiced by a bench trial rather than a jury trial. *See CPI Plastics, Inc. v. USX Corp.*, 22 F.Supp.2d. 1373, 1378 (N.D. Ga. 1995) (granting motion to strike jury demand two weeks before a trial and noting no prejudice because there was no right to a jury, and a bench trial would require less preparation than a jury trial). We conclude that BOA properly withdrew its consent to a jury trial.[2]

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2. Of course not even the consent of BOA would have guaranteed Kramer a jury trial. A district court is not obligated to use a jury where one is not required even if both parties agree to use a jury. Rule 39(c) clearly contemplates a role for the court in deciding to use a jury where one is not required. *Merex A.G. v. Fairchild Weston Systems, Inc.*, 29 F.3d 821, 827 (2d Cir.1994) ("[W]hen both parties consent, Rule 39(c) invests the trial court with the discretion—but not the duty—to submit an equitable claim to the jury for a binding verdict. While the litigants are free to request a jury trial on an equitable claim, they cannot impose such a trial on an unwilling court.").

Appendix A

Compensatory and punitive damages are not available to a plaintiff bringing a claim of retaliation by an employer under the ADA. Without the right to recover compensatory and punitive damages, Kramer did not have a right to a jury trial and she was entitled to a jury trial only with the consent of BOA and the court. BOA properly withdrew its consent to a jury trial. For these and the foregoing reasons, we AFFIRM.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: January 20, 2004

BEFORE: Honorable KENNETH F. RIPPLE, Circuit Judge

Honorable DANIEL A. MANION, Circuit Judge

Honorable ANN CLAIRE WILLIAMS, Circuit Judge

No. 02-3662

COLLEEN P. KRAMER,

Plaintiff - Appellant

BANC OF AMERICA SECURITIES, LLC,

Defendant - Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 99 C 6768, James B. Zagel, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX B — FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, DATED SEPTEMBER 11, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 99 C 6768

Honorable James B. Zagel

COLLEEN P. KRAMER,

Plaintiff,

vs.

BANC OF AMERICA SECURITIES, LLC,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant Banc of America Securities, LLC, ("BOA"), by its undersigned attorneys, submits the following proposed findings of fact and conclusions of law in accordance with the Court's May 22 oral ruling in favor of BOA at the close of the bench trial of Plaintiff Colleen P. Kramer's claim of retaliation under the Americans with Disabilities Act, 42 U.S.C. § 12203(a).

Appendix B

FINDINGS OF FACT

A. The Parties, Jurisdiction and Venue

1. BOA is a limited liability corporation with an office located at 231 South LaSalle Street in Chicago, Illinois. It is a subsidiary of Bank of America.

2. The Plaintiff, Colleen P. Kramer, (hereinafter "Ms. Kramer" or "Plaintiff') began working for BOA in October 1995 in Loan Syndications and Trading located in the Chicago office. Her duties included the structuring of loans for middle market companies so that the loans could be syndicated to other financial institutions.

3. On September 24, 1999, while employed at BOA, Ms. Kramer filed a charge of discrimination with the Equal Employment Opportunity Commission alleging discrimination and retaliation under the Americans with Disabilities Act 42 U.S.C. § 12101 et seq. ("ADA"). The EEOC issued a "Notice of Right to Sue." Ms. Kramer later timely filed a second charge of discrimination that claimed her termination on October 7, 1999, was discriminatory and retaliatory.

4. Plaintiff filed this action on October 15, 1999, asserting that BOA discriminated against her and retaliated against her in violation of the ADA because she has multiple sclerosis ("MS"), retained an attorney, and requested certain accommodations. She later filed an amended complaint that dropped pendent state law claims for negligent and intentional infliction of emotional distress.

5. The Plaintiff stated in her Complaint that this Court's jurisdiction is based upon 28 U.S.C. §§ 1331, 1337, 1343 and 1345.

6. Venue in this Court is based upon 28 U.S.C. § 1391 as Defendant resides in this state and district, and all acts complained of took place in this state and district.

B. Facts Related to Ms. Kramer's Employment and Termination

7. In October 1998, Bank of America and Nations Bank merged, after which the Chicago Middle Market Syndicated Finance Group was formed. Ms. Kramer was Team Leader of that group.

8. Prior to the merger, Ms. Kramer's supervisor was Mark Lies (hereinafter "Mr. Lies").

9. Following the merger, Ms. Kramer reported to Mary Lynn Moser, (hereinafter "Ms. Moser"), as her immediate supervisor. Ms. Moser was located in the Charlotte, North Carolina office of BOA and traveled to Chicago from time to time in the course of her supervisory duties for middle market syndicated finance operations.

10. As a result of post-merger changes in BOA's syndicated finance operations, Ms. Kramer was required to work with the Syndicate Desk, based in Charlotte, N.C., in order to structure syndicated loan transactions. Prior to the merger, BOA did not have a Syndicate Desk.

Appendix B

11. On March 2, 1999, Ms. Moser and Ms. Kramer met to discuss the progress of the Chicago Middle Market Syndicated Finance Group since the merger. At that time Ms. Moser expressed some concerns about Ms. Kramer's job performance, particularly leadership ability and interpersonal skills.

12. On April 22, 1999, Ms. Moser again met with Ms. Kramer and had another conversation regarding Ms. Kramer's job performance deficiencies, particularly with respect to her leadership ability as Team Leader of the Chicago Middle Market Syndicated Finance Group.

13. On May 28, 1999, again Ms. Moser met with Ms. Kramer and expressed concerns about her job performance both as a team leader and a senior structurer. On that date, Ms. Moser gave Ms. Kramer a detailed memorandum outlining the job performance concerns. The May 28 memo indicated that Ms. Kramer needed to improve her performance as a senior structurer in several specific areas – including supporting the middle market effort in the Midwest, utilizing the Distribution department to maintain investor relations, involving Syndicate Desk as much as possible in all proposals, communicating with superiors about her activities, promoting two-way communication with her teammates, participating in important internal meetings, and working as a collaborative team member.

14. The May 28 memo also stated Ms. Kramer's performance as a senior structurer, including her "social ability," would need to improve over the next 90 days. Ms. Moser indicated that a performance review would be conducted in 90 days.

15. At the end of May, Ms. Moser replaced Ms. Kramer as Team Leader, putting Eric Schubert, another employee from the Chicago office of BOA, into the Team Leader position. Thereafter, Ms. Kramer no longer had Team Leader responsibilities but she continued to work as a Senior Structurer in the Chicago group and retained her corporate title of Managing Director and her same salary and benefits.

16. On July 12, 1999, Glenn Stewart, who worked on the Syndicate Desk in Charlotte, N.C., sent an e-mail message to Ms. Moser in which he expressed disappointment with Ms. Kramer's job performance. He stated in the e-mail that Ms. Kramer had not provided him with "many of the basic structuring items that a good structuring person would do," such as information on comparable transactions in the industry, an analysis of cyclicality and an analysis of the company's capital expenditures. He also wrote that "she did not instill in me any confidence in her knowledge that I could rely on." He added that Ms. Kramer "also does not seem to grasp the team concept."

17. At the time Mr. Stewart wrote the July 12, 1999, e-mail message to Ms. Moser, he had no knowledge that Ms. Kramer has multiple sclerosis or that she had hired an attorney to represent her concerning her employment at BOA and had asked for accommodations under the ADA.

18. Ms. Moser discussed performance issues with Ms. Kramer at least three or four times over the next few months, leading up to September 1, 1999.

19. Also during the summer time period leading up to September 1, 1999, Ms. Kramer had disagreements with her supervisors, Mr. Schubert and Ms. Moser, regarding various issues on some proposed transactions. There is no dispute that these disagreements were unrelated to Ms. Kramer's alleged disability or her assertion of rights under the ADA.

20. In a memorandum to Ms. Kramer dated September 1, 1999, Ms. Moser expressed continuing concern with Ms. Kramer's job performance. This memo stated that if Ms. Kramer's job performance did not improve over the next 30 days, her employment would be terminated.

21. Ms. Moser conferred with her supervisor, Arrington Mixon (hereinafter "Ms. Mixon"), regarding the possible termination of Ms. Kramer. Ms. Mixon agreed with the decision to terminate Ms. Kramer's employment because Ms. Kramer had failed to improve her job performance.

22. On October 7, 1999, Ms. Moser informed Ms. Kramer that her job performance had not improved and that her employment with BOA was terminated.

C. Facts Concerning Ms. Kramer's Alleged Disability and Claim of Retaliation

23. Ms. Kramer was diagnosed with multiple sclerosis before she came to work for BOA.

24. She described its ordinary effects in 1998 as limiting some ability to use her left hand, but this manifestation of multiple sclerosis did not affect her ability to perform job functions.

25. Around October 1998 and continuing into 1999, Ms. Kramer began to experience dizziness and shakiness when deprived of sleep.

26. Her neurologist, Dr. Michael Minieka, testified that he examined Ms. Kramer in September 1998 and on May 27, 1999 and that at those times the symptoms of multiple sclerosis in Ms. Kramer would not have been obvious to people who lacked medical training.

27. In 1999, while employed at BOA, Ms. Kramer was able to run up to three to four miles, up to four times a week, although she testified that at times she was forced to walk part of the way during such exercise outings, which lasted an hour or more. In September 1999, a physical therapist told her to stop running such long distances after she started tripping and dragging her foot.

28. In June of 1999, Ms. Kramer retained a lawyer, Marc Sherman. The lawyer wrote a letter dated June 18, 1999, to Ms. Moser, which requested accommodations for Ms. Kramer's multiple sclerosis, noting that job-related stress was aggravating her condition. The letter requested that Ms. Kramer be excused from early morning meetings and be allowed to take rest breaks as needed.

29. Ms. Kramer did not tell Ms. Moser about her illness prior to her replacement as Team Leader, and Ms. Kramer admits that she cannot prove, at least has no direct evidence, that Ms. Moser knew of her illness at the time of the meeting and memo on May 28. It is quite clear from the evidence that Ms. Moser did not know of Ms. Kramer's multiple sclerosis

prior to the June 18, 1999 letter from Ms. Kramer's lawyer, Mr. Sherman.

30. On September 24, 1999, Ms. Kramer filed a charge of disability discrimination and retaliation with the Equal Employment Opportunity Commission and sent notification of this to Ms. Moser and Ms. Mixon via an e-mail message on September 28, 1999.

31. The Court dismissed Ms. Kramer's disability discrimination claim on summary judgment because she did not allege that her ability to perform a wide range of jobs was substantially limited, and under the ADA a plaintiff must show that there are significant limitations on the ability to perform a wide range of jobs.

32. Ms. Kramer does not dispute her ability to do the job. She was able to travel out of town on overnight trips. She testified during discovery, and later during trial, that her work performance was excellent up to the time of her termination, which really cuts against an argument that her illness significantly impacted her work capacity.

33. Plaintiff has conceded a lack of disability and lays her discharge to her failure with respect to deficits, if they exist, which are utterly unconnected to any sequelae of multiple sclerosis.[1]

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1. With respect to parenthetical references to trial testimony, these references should not be taken to mean that the Court reconsidered its ruling on summary judgment in light of the trial testimony. These references are made only for purposes of setting forth the context of the case.

34. On the issue of retaliation, it is undisputed that Ms. Kramer engaged in a protected activity and she suffered an adverse employment action. The issue is, whether she has proven causation between the protected activity and her termination.

35. On this issue, the Court denied summary judgment because it found that BOA's concern with Ms. Kramer's social ability which could justify her losing the Team Leader position was arguably a pretextual ground for her termination, at least after she lost supervisory responsibilities.

36. On its face there is nothing wrong with discharging someone because they do not work well with others, particularly since both parties agree that this syndicated finance business requires a lot of teamwork.[2]

37. There is a theme, present in her counsel's questioning of witnesses, that Ms. Kramer's inability to work within the team processes was not all that important because she was closing big deals on which the bank made a lot of money, winning out over competitive banks. Nonetheless, the

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2. This is not inherent in the job. There was a time when a single individual at a bank, subject only to routine review by the bank's directors, could make a loan decision on his or her own hook and, though not common, could syndicate the loan, a process that bears a close resemblance to reinsurance or insurance pool practices. But, after a series of well-known failures in banking loan practices, the prevailing mode of loan operations requires lots of checks and balances and spreading of the risks. Banking regulators and bank shareholders pretty much dictate these practices. Ms. Kramer cannot really dispute that working well with others is important now in banking.

testimony establishes that the process, which requires teamwork — and the Court found that this is what was meant by "social ability" — is important.[3]

38. Ms. Kramer had been employed by BOA for three years prior to being a Team Leader in October, 1998, and there is really no evidence of concerns about her social ability at that time. In January of 1998 she was described as exhibiting an increased level of teamwork and clearly working better with her colleagues and her overall performance rating was "exceeds expectations." In January of 1999 she received an overall performance rating of "far exceeds" expectations and no concerns about "social ability" or the equivalent were expressed. So, Ms. Kramer has evidence that while her social ability may not have been characterized in prior evaluations as outstanding, it was, at least, acceptable.

39. No superior of Ms. Kramer knew of the fact that she had MS prior to June 18, 1999, when her lawyer sent a letter to them to inform them that she had MS. This is significant because the first formal display of BOA's displeasure with Ms. Kramer's performance was a memo of May 28, 1999. What is meant by "formal" is put into paper form, which is usually the kind of first step that leads to a process of significant change in the employee's performance or some form of sanction.

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3. Indeed, the person most critical of Ms. Kramer was her boss, Ms. Moser, who herself once received a communication from her superior that she, Ms. Moser, was unduly focused on the process failures of Ms. Kramer and that the important thing is that the deals were made.

40. There had been criticisms of Ms. Kramer's performance before the May 28, 1999 memo but the memo was clearly a watershed — the kind of document that tells any employee as intelligent as Ms. Kramer that her job might be on the line.

41. Ms. Moser had a rational basis for believing, and she, in fact, did believe that Ms. Kramer did have deficits in working with some people and at times may have caused valuable employees to leave the department or BOA itself.

42. There are employees, on all of the evidence before the Court, who did work well with Ms. Kramer and admired her. But some, quite clearly, did not.

43. The teamwork failings alleged by BOA are not said to run across the board; it was a sometime thing; she was a good team player at times, and a bad team player at others.

44. Testimony such as that of co-worker Christine Tierney's, as one example, establishes that Ms. Moser did not arrive at her opinion of Ms. Kramer's performance by making up comments of others — whether those comments are true in the objective sense or not true, the Court has no way of knowing and no need to know.

45. The testimony of Mr. Stewart, Ms. Tierney, Mr. Schubert and subordinate Patricia Camino all supports Ms. Moser's assessment of Ms. Kramer's performance issues, and there is implicit support in the testimony of other witnesses.

46. All of this, the truth of which need not be decided here, was in Ms. Moser's mind before she knew of the MS and she was entitled to credit it even if it were not the truth.

47. While Ms. Kramer was employed at BOA, Mr. Stewart, Ms. Tierney and Ms. Camino had no knowledge that Ms. Kramer has multiple sclerosis or that she had hired an attorney to represent her concerning her employment at BOA and had asked for accommodations under the ADA.

48. Ms. Kramer's counsel had candidly stated that he has no direct proof that anyone of rank at BOA knew of the MS before the June 18, 1999 lawyer letter, but he thinks such an inference can be made on circumstances. He is wrong. Indeed, if one looks at Mr. Sherman's letter, which contains some factual errors, and puts the matter in context, there is a strong flavor that Ms. Kramer is less concerned about accommodating a disability and more concerned with some plausible theory to bring her to safety within the bank. In reference to the letter, the Court was reminded of the phrase, "In a storm, any port will do."

49. With respect to the ultimate truth of Ms. Moser's opinion of Ms. Kramer's failings, it is very difficult to decide how true all these complaints may be, but some are. As Ms. Kramer has said, she certainly had a motive to be on her best behavior to keep her job. But the truth is she also had a clear disagreement with the way she had been treated and a good reason, from her perspective, to protest or even to be uncooperative.

50. Mr. Schubert, for example, did not trust Ms. Kramer — perhaps even feared her, and certainly viewed her as a rival, and his views, in the end, can be confirmed by actions Ms. Kramer took after her termination, which he correctly viewed, even if they were not intended as such, as a threat to some of the bank's client base.

51. As stated earlier, however, there are others, not in Mr. Schubert's position, whose personal position at the bank was not being threatened, who also informed Ms. Moser of their perceptions of Ms. Kramer' shortcomings, and the perceptions are not significantly different than those of Mr. Schubert.

52. At the time the termination decision was made, both Ms. Moser and Ms. Mixon knew that Ms. Kramer had MS. They not only knew she had MS, they knew she had filed a discrimination complaint against BOA with the EEOC.

53. Ms. Kramer and Ms. Moser, the principal players in this case, both testified at trial. They are both highly intelligent, well-educated persons and have substantial experience in working within large financial institutions. Neither of them could be characterized as timid or submissive. Both are highly compensated, and neither is reluctant to claim credit for her achievements, as was demonstrated by Ms. Kramer's testimony on what fees ought to have been allocated to her efforts.

54. Mr. Lies, the former supervisor whose testimony was presented by deposition, knew both Ms. Kramer and Ms. Moser well, although it appears he knew Ms. Kramer

better. He is a witness who seemed to have no ax to grind. Mr. Lies left employment at BOA in April 1999.

55. Mr. Lies said he had given Ms. Kramer annual performance evaluations and gave her fine rankings but thought she could improve her demeanor and teamwork.

56. Mr. Lies said that when Ms. Kramer first joined BOA she went through a period of adjustment. "She was a very strong, dominant personality with a very firm understanding and a somewhat limited patience for ancillary white noise in discussions and working with others and tried to focus very quickly on issues and move on."

57. He noted the culture at BOA was collegial, laid back, and Ms. Kramer's attitude and demeanor were "difficult to take" by some co-workers. "They had issues with being challenged and being pushed and things of that nature, and so it was more of a personality differential," Mr. Lies stated. He said she understood this and tried to, and did, improve in this area.

58. Mr. Lies said Ms. Kramer had very strong skills and technical capabilities, which were acknowledged by competitors and were a reason BOA hired her. She had to work around her "forceful and dominant personality." However, he noted, "over a passage of time I think everybody came to understand that what she was really trying to do was help them (team members) and the discipline she was passing on was something that was very good for their development."

Appendix B

59. Mr. Lies said Ms. Kramer's credit judgment was respected. There was, as Mr. Lies called it, a chemistry issue in her dealings with others. According to Mr. Lies, he observed conflict — what he termed "head butting" — between Ms. Kramer and Mr. Schubert.

60. Mr. Lies said of Ms. Moser that "she was average to above average in credit skills but less good than Ms. Kramer." He thought from a personality communications standpoint Ms. Moser was very good.

61. He also gave some insight into the source of dispute between the two. Of Ms. Moser, he said, "she needed to be a little bit more sensitive to the way people did things. I think there was a desire to clearly do everything the NationsBank way, which I think there is some resistance across the board from people from B of A and I think (Ms. Moser) had a demeanor and personality that some people would view as very positive but when you put that together with somebody like Colleen (Kramer), who had a very dominant personality, there could be issues between those."

62. Mr. Lies also said, "Mary Lynn (Moser) is a very thoughtful person on the surface. I think she wanted to be very communicative, but yet it was a cultural. . . .but it was a culture that existed in Charlotte that in my personal estimation that avoided conflict and confrontation which was very different from (Ms. Kramer's) personality. She would be much more up-front and confrontational. I know I experienced it in the period of time we were merging. I would quickly focus on particular issues and force decisions and things like that which was very alien from the way they had

operated. So just the chemistry differential between her and (Ms. Moser) was difficult, and then when you layer on top of that a geographic differential between Charlotte and Chicago, that can cause issues."

63. The evidence presented at trial indicates that Ms. Kramer is excellent in her credit judgment and less than truly splendid in teamwork. Thus, there was a dispute as to whether her teamwork skills with subordinates and others were poor, medium, or even good enough. Nevertheless, it is not the Court's province to judge whether her teamwork skills are good enough.

64. After seeing and hearing Ms. Kramer and Ms. Moser at some substantial length, it is evident that they could not work well together. The teamwork between the two did not appear to be good. Based on the information presented at trial, it seems that if Ms. Moser were the team leader and Ms. Kramer the boss, it is likely that Ms. Moser would not have lasted very long. Although there probably would not have been a formal termination, Ms. Moser would have left by moving to some other place in the bank.

65. Ms. Kramer and Ms. Moser appear to be like oil and water, and it seems that regardless of the position each might hold, whomever was the subordinate would have not survived.

66. Ms. Kramer testified that she felt she could not do anything right in the eyes of Ms. Moser. Based on the testimony presented at trial, it appears that she is essentially right. However, that is the only reason Ms. Kramer was fired,

and the filing of her complaint was not a factor in that decision.

67. It seems that Ms. Moser wrote the May 28, 1999, memo with an honest eye to preserving Ms. Kramer's value to the bank, which indicates that Ms. Moser did think of saving Ms. Kramer.

68. Indeed, Ms. Kramer may have been savable, even in the context of the syndication group in which she worked. However, it is understandable that a supervisor could reasonably decide that the cost and effort involved in doing so would be far too high.

69. One could argue, although Ms. Kramer's counsel did not, that the potential disability of Ms. Kramer was a motivating factor in her discharge in a way unjustified by existing law.

70. Ms. Mixon, who was Ms. Moser's superior, and who played a role in the decision to terminate, understood quite clearly the application of the ADA to Ms. Kramer.

71. That is why Ms. Mixon told Ms. Moser to make the requested accommodations. Whether Ms. Moser refused to make them or simply uttered words that were misunderstood by Ms. Kramer is not decided by the Court — for purposes of this ruling, it is assumed Ms. Moser did refuse accommodations.

72. Hence, it is possible that Ms. Mixon and Ms. Moser considered the future and realized that Ms. Kramer's

condition might well worsen over time and create demands for further accommodations, perhaps costly and troublesome ones, and perhaps requests made only to fend off criticisms of her performance.

73. This would be a possible motive to fire Ms. Kramer, but it would not help Ms. Kramer's case, for it is not retaliation for filing the complaint. Nor can such a motive be considered a refusal to offer a requested reasonable accommodation in violation of the ADA.

74. Potential future disabilities are not the subject of the ADA, and it is hard to see how they could be in any practical way. This case is an example of why this is so. Ms. Kramer could not possibly have asked for accommodation for disabilities that did not and may never exist. She does not think that her ability to perform is about to end anytime soon. Rather, she thinks that she can do the job even now.

75. BOA could not reliably surmise whether the accommodations would or would not be reasonable. For example, travel might become extremely difficult for Ms. Kramer in the years to come but no one can know whether this would, in fact, affect her ability to do the job even in terms of the technical advances that may result, and in fact, September 11 did result in massive decrease in travel. Also, the only additional accommodation she would ask for today is that she would be not asked to travel on short notice. Thus, even travel is not yet precluded.

76. Considerations of possible future disability and accommodations for Ms. Kramer did not enter the mind of

either Ms. Moser or Ms. Mixon or indeed anybody at BOA. They were willing to make accommodations. The jobs in question are not jobs that involve physical performance or "heavy lifting jobs."

CONCLUSIONS OF LAW

1. BOA is an employer within the definition of the ADA. 42 U.S.C. § 12111(5)(A).

2. This Court has jurisdiction based upon 28 U.S.C. §§ 1331 and 1343(a).

3. Venue is proper in this Court as the Defendant resides in this state and district, and all acts complained of took place in this state and district. 28 U.S.C. § 1391.

4. The burden-shifting analysis for employment discrimination cases as set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973) applies to claims of retaliation. *Hunt-Golliday v. Metropolitan Water Reclamation Dist.*, 104 F.3d 1004, 1014 (7th Cir. 1997); *see also, Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 511 (7th Cir. 1998) (courts look to Title VII retaliation cases for guidance in assessing ADA retaliation claims). In order to succeed on a claim of retaliation, a plaintiff first must prove that she engaged in protected activity, that she suffered an adverse employment action and that there is a causal link between the protected activity and the adverse action. *Hunt-Golliday*, 104 F.3d at 1014, *see also, Roth v. Lutheran General Hosp.*, 57 F.3d 1446, 1459 (7th Cir. 1995). To ultimately prevail, the plaintiff must rebut the employer's

legitimate, non-discriminatory reasons for the adverse action and establish that a discriminatory motive was the determining factor behind the employer's adverse action. *Roth*, 57 F.3d at 1459.

5. In addition, a plaintiff raising a retaliation claim must have a reasonable belief that she is opposing unlawful discrimination. *Id.* at 1460.

6. In this case, it is apparent that Ms. Kramer's complaint of disability discrimination under the ADA was futile. It was not, in any realistic sense, a factor that lead to her.

7. The stated reasons for her firing are not a pretext for unlawful retaliation under the ADA. They represent the truth and reflect the thoughts of those individuals who made the decision to discharge her.

8. In the end, even if Ms. Moser erred in her judgment about the effect of Ms. Kramer on other employees or her occasional perceived lapses of teamwork, Ms. Moser held an honest belief in her judgment and she did have a reasonable basis for her belief, which is what the courts are referring to when they talk about a decision having some basis in fact. *See, e.g., Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 677 (7th Cir. 1997) (question is not whether the employer's reasons for a decision are *right,* but whether the employer's description of its reasons is *honest)* (emphasis in original); *McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 373 (pretext does not address correctness or desirability of reasons offered for employment decisions; rather, it addresses whether employer honestly believes in

the reasons it offers). They are not speaking about absolute truth-they are speaking about a reasonable basis for one's belief.

9. Even if the stated reasons were pretext, they could have been pretext to conceal the reluctance of those in a position to fire Ms. Kramer to work with someone of her personality. That ground for decision is not prohibited by federal law. *See Reeves v. Sanderson Plumbiniz Prods., Inc.*, 530 U.S. 133, 146-48, 120 S.Ct. 2097, 2108-9 (2000).

10. Upon hearing the evidence at trial, no reasonable trier of fact would have concluded that retaliation for complaining about disability discrimination; hiring a lawyer to assert her rights under the ADA; or filing a charge of disability discrimination with the EEOC played any role in BOA's decision to terminate Ms. Kramer's employment.

11. Although damage issues were not addressed, there was adequate evidence of efforts at mitigation, and the testimony of BOA's expert that Ms. Kramer should have found employment in a relatively short period of time is not accepted.

12. For the reasons stated above, judgment is entered for the Defendant, Banc of America Securities, LLC.

ENTER:

s/ James B. Zagel
James B. Zagel
United States District Judge

DATE: 11 Sep 2002

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judgment In A Civil Case

Case Number: 99 C 6768

COLLEEN P. KRAMER

v.

BANC OF AMERICA SECURITIES

* * *

Decision by Court. This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of defendant, Banc of America Securities, LLC and against plaintiff, Colleen P. Kramer. Plaintiff takes nothing from the defendant.

Michael W. Dobbins, Clerk of Court

s/ Donald R. Walker
Donald Walker, Deputy Clerk

Date: 9/11/2002

APPENDIX C — EXCERPT FROM DOCKET SHEET FOR 1:99-CV-6768 U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS FILED MAY 10, 2002

* * *

05/10/2002	* * *	SCHEDULE set on 5/10/02 by Hon. James B. Zagel : Jury trial stricken. Bench trial set to 10:30 5/15/02. No notice [Date Entered: 05/14/02, By: dw]

APPENDIX D — STATUTES INVOLVED

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126--EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES
SUBCHAPTER I--EMPLOYMENT

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

* * * *

§ 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

* * * *

Appendix D

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126--EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES
SUBCHAPTER IV--MISCELLANEOUS PROVISIONS

§ 12203. Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) Remedies and procedures

The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III of this chapter, respectively.

* * * *

Appendix D

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21--CIVIL RIGHTS
SUBCHAPTER VI--
EQUAL EMPLOYMENT OPPORTUNITIES

§ 2000e-5. Enforcement provisions

* * *

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

* * *

Appendix D

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

* * * *

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21--CIVIL RIGHTS
SUBCHAPTER I--GENERALLY

§ 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C.A. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited

under section 703, 704, or 717 of the Act [42 U.S.C.A. §§ 2000e-2, 2000e-3, or 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C.A. §§ 2000e-5 or 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations implementing section 791 of Title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of

1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

* * *

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)].

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(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means—

(A) in the case of a person seeking to bring an action under subsection (a)(1)

of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of Title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12111 et seq.].

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

* * * *